No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* DAVID BOREN, BRAD HENRY, TOM COLE, NEAL MCCALEB, DANNY HILLIARD, KRIS STEELE, DANIEL BOREN, T.W. SHANNON, LISA JOHNSON BILLY, THE CHICKASAW NATION, AND THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici have a practical, close-up understanding of the jurisdictional concerns state and tribal authorities face in eastern Oklahoma and hands-on experience in resolving such concerns through tribal-state agreements in areas such as taxation of motor fuel and tobacco, Indian gaming, transportation funding, and policing. The *amici* are the Chickasaw Nation and Choctaw Nation of Oklahoma ("*amici* Nations"), both federally recognized Indian tribes, 83 Fed. Reg. 4235, 4239 (Jan. 30, 2018), and several former officials of the State of Oklahoma. David Boren[2] and Charles "Brad" Henry[3] served as Governor of Oklahoma. The Honorable Thomas "Tom" Cole, United States Representative, served as Oklahoma Secretary of State during the administration of Governor Frank Keating, when many of the foundational tribal-state compacts

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief as reflected in correspondence filed with the clerk.

[2] Mr. Boren was Governor from 1975-1979. He also represented Oklahoma in the United States Senate from 1979-1994, where he served on the Senate Indian Affairs Committee. Mr. Boren earlier served in the Oklahoma House of Representatives from 1967-1975, and was President of the University of Oklahoma from 1994-2018.

[3] Mr. Henry was Governor from 2003-2011. He also served in the Oklahoma Senate from 1992-2003, and was chair of the Judiciary Committee and vice-chair of the Economic Development Committee. He is currently an attorney in private practice.

were negotiated.[4] The leadership experience of these amici on tribal-state issues is extensive. Neal McCaleb has served in several official capacities, including as Oklahoma Secretary of Transportation, and as Director of the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority.[5] During that time, he worked extensively on joint state and tribal funding of transportation projects. Other *amici* served in the Oklahoma legislature when the State and the *amici* Nations negotiated agreements addressing jurisdiction and governance in Eastern Oklahoma. Former Speaker Pro Tempore Danny Hilliard served in the Oklahoma House of Representatives when the Oklahoma tribes and the State developed a solution to the taxation of tobacco and motor fuel sales in Indian country in Oklahoma. This solution rested on the State's enactment of legislation authorizing the State to negotiate compacts with tribes to allocate

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[4] Congressman Cole served as Oklahoma Secretary of State from 1995-1999, after serving in the Oklahoma Senate from 1988-1991. He has represented the fourth congressional district in the United States House of Representatives since 2003. His district covers a portion of the Chickasaw Nation's Reservation. He is a citizen of the Chickasaw Nation.

[5] Mr. McCaleb served as Secretary of Transportation from 1987-1991, and again from 1995-2001. During the latter period he concurrently served as Director of the Department of Transportation and as Director of the Turnpike Authority. He served in the Oklahoma House of Representatives from 1975-1983 and was House Minority Leader from 1979-1983. He served as Assistant Secretary of the Interior—Indian Affairs, United States Department of the Interior, from 2001-2003. Mr. McCaleb has been the Chickasaw Nation's Ambassador-at-Large to the United States since 2013 and is the Chairman and Director of Chickasaw Nation Industries, Inc., a Chickasaw Nation-owned corporation that promotes tribal economic development. He is a citizen of the Chickasaw Nation.

revenue from those sales. This model solution has been in place ever since.[6] And Mr. Hilliard, former Speaker Michael "Kris" Steele,[7] and Daniel "Dan" Boren,[8] all served in the Oklahoma House when the State developed its model Indian gaming compact, under which Oklahoma tribes have operated since 2004. Each also served in the Oklahoma House when the State negotiated numerous cross-deputization agreements and motor vehicle licensing compacts with Oklahoma tribes, as did former House Speaker

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[6] Mr. Hilliard served in the Oklahoma House of Representatives from 1990-2004, and was Speaker Pro Tempore from 2003-2004, as well as House Majority Leader and Chairman of the Subcommittee on Appropriations. He served as Executive Officer and Vice President for External Relations and Planning for the University of Oklahoma from 2004-2015. He is currently Vice President of Corporate Development and Tourism for the Chickasaw Nation.

[7] Mr. Steele served in the Oklahoma House of Representatives from 2001-2013. He was Speaker from 2011-2012 and Speaker Pro Tempore from 2009-2011. He is currently a member of the Oklahoma Pardon and Parole Board.

[8] Mr. Boren served in the Oklahoma House of Representatives from 2002-2004. From 2005-2013, he represented Oklahoma's second congressional district—which includes a significant portion of eastern Oklahoma and the Five Tribes' Reservations—in the United States House of Representatives. He is currently President of Corporate Development for the Chickasaw Nation.

Tahrohon Wayne "T.W." Shannon[9] and Lisa Johnson Billy.[10]

Amici's interest, like that of the Muscogee (Creek) Nation ("Creek Nation"), *see* Creek Nation Br. at 1, is in refuting Petitioner's and his supporting *amici*'s assertions that the decision below will have immediate, wide-ranging, and damaging impacts across eastern Oklahoma. *See* Pet. Br. at 3; States' Br. at 20-21; Okla. Indep. Petrol. Ass'n ("OIPA") Br. at 29-32; Envtl. Fed'n of Okla. ("EFO") Br. at 8-9. *Amici*'s experience shows those assertions are implausible. For more than two decades, the *amici* Nations' sovereign authority within their Reservation and commitment to the cooperative exercise of that authority has provided the framework for the negotiation of agreements with the State that provide legal and economic stability and a better quality of life for all Oklahomans. That manifest experience, unlike Petitioner's and his *amici*'s speculative parade of horribles, is the only reasonable basis for assessing the likely prospective impact of affirmance of the decision of the court below, which

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[9] Mr. Shannon served in the Oklahoma House of Representatives from 2007-2015, where he was Speaker from 2013-2014 and Chairman of the Transportation Committee. He is currently President of Bank2, a full-service bank owned by the Chickasaw Nation. Mr. Shannon is a citizen of the Chickasaw Nation.

[10] Ms. Billy served in the Oklahoma House of Representatives from 2004-2016 and sat on the Joint Committee on State-Tribal Relations, which reviews tribal-state agreements, including cross-deputization agreements, gaming compacts, and motor vehicle licensing compacts. She served in the Chickasaw Nation Tribal Legislature from 1996-2002, and from 2016 to the present. She is a citizen of the Chickasaw Nation.

correctly held that the Creek Reservation continues to exist.

SUMMARY OF ARGUMENT

The *amici* Nations' and Creek Nation's exercise of sovereignty on their respective Reservations has been good for Oklahoma. In one area after another—taxation, gaming, motor vehicle registration, law enforcement, and water rights—the Nations' sovereignty within their Reservation and the State's recognition of that sovereignty have provided the framework for the negotiation of inter-governmental agreements that benefit all Oklahomans. The only reasonable expectation of affirmance is a continuation of that success; conversely, the only reasonable expectation of Petitioner's hyperbolic bid for reversal would be damage to the decades-in-the-making fabric of inter-governmental agreements that have served Oklahoma and its economy well, while enhancing meaningful tribal self-determination. We call on the Court to resist that bid and to protect the on-the-ground success of state-tribal relations in Oklahoma.

ARGUMENT

I. OKLAHOMA'S AND THE NATIONS' NEGOTIATED APPROACH TO SETTLING JURISDICTIONAL ISSUES ON THE NATIONS' RESERVATION BENEFITS ALL OKLAHOMANS.

The criminal jurisdiction issue presented in this case is properly resolved by deciding whether the murder for which Respondent was prosecuted occurred in "Indian country," as defined in 18 U.S.C. § 1151(a). And that issue turns on whether the Creek Reservation has been diminished, which Respondent and the

Creek Nation have comprehensively addressed. Petitioner's question presented submits no issue to this Court concerning the civil jurisdiction of the Creek Nation, or of any other of the so-called "Five Civilized Tribes."[11] *See* Pet. Br. at i, 2. And the only question addressed in the proceedings in the courts below concerns the continued legal significance of the Creek Nation's Reservation boundaries for purposes of enforcing criminal law. This case does not call on the Court to consider or address tribal sovereignty in any manner, much less tribal civil regulatory authority over hypothetical subject matter or third parties, though Petitioner and his amici intimate otherwise; nor does it call on the Court to consider, much less address, any questions specific to any other of the Five Tribes' legal histories, sovereign rights and boundaries, or Congress's actions in their regard.[12]

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[11] The Five Civilized Tribes are the Creek, Cherokee, Seminole, Choctaw, and Chickasaw Nations. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976). We refer to these tribes collectively as the "Five Tribes."

[12] While Petitioner seeks to generalize about the treaty rights of the Five Tribes, *see, e.g.*, Pet. Br. at 20, the "argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Under those principles, the Court "examine[s] the historical record and consider[s] the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id.* This case contains no record of the Chickasaw and Choctaw Nations' treaties, which Petitioner references only once, Pet. Br. at 5-6 n.2, and thus provides no basis for asserting that rights held under those treaties have been abrogated. To make that determination would require the Court to "look beyond the written words to the larger context that frames the Treaty,

The limited nature of the question presented notwithstanding, Petitioner and his *amici* argue for reversal by asserting that the decision below has immediate adverse impacts on civil jurisdiction in eastern Oklahoma. *See* Pet. Br. at 4, 56; States' Br. at 20-21; OIPA Br. at 29-32; EFO Br. at 8-9. These arguments are misplaced, first, because the framework for deciding the extent of tribal civil jurisdiction is starkly different from that which determines criminal jurisdiction in Indian country[13] and, second,

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including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) and citing *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999)). Petitioner's generalizations concerning the impact of the Allotment Era legislation fail for similar reasons. Petitioner relies heavily on the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495. *See* Pet. Br. at 10-11. But the Curtis Act contained a separate agreement with the Chickasaw and Choctaw Nations that continued their governments in effect for a period of eight years and superseded any inconsistent provisions of the Curtis Act (except for § 14, which addressed town sites). *Id.* § 29, 30 Stat. at 505-13 (the "Atoka Agreement"). Petitioner cites the Atoka Agreement but once. Pet. Br. at 11 n.3. And while Petitioner also relies on the Five Tribes Act of 1906, ch. 1876, 34 Stat. 137, Congress expressly declared in the Act "[t]hat the tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law." *Id.* § 28, 34 Stat. at 148. The application of that Act therefore requires an understanding of each tribal government's rights at that time, which is lacking here for the Chickasaw and Choctaw Nations for the reasons just stated.

[13] The Indian country status of land is relevant to tribal civil jurisdiction, *see DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 427 n.2 (1975), but the existence of tribal civil jurisdiction over non-Indians is determined under a different framework to which Petitioner and his *amici* give short shrift. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008);

because the Creek and the *amici* Nations have long exercised their sovereignty in a manner that accommodates state and local government interests, enhances economic stability, and protects the rights of non-tribal citizens. Numerous tribal-state intergovernmental agreements that produce positive results for Indians and non-Indians throughout Oklahoma on a daily basis confirm that conclusion, and as the Court weighs its decision in this case, the existence and effect of those agreements should be considered as well.

A. The Nations Provide Governmental Programs and Services Throughout the Reservation.

The *amici* Nations hold their Reservation under treaty with the United States, Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"), which secured "a tract of country west of the Mississippi River" to the Choctaw Nation to "exist as a nation and live on it," *id.* art. 2, and the "jurisdiction and government" over "all the persons and property" within that Reservation, *id.* art. 4. The Chickasaw Nation secured rights to the Reservation "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])" under the Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995). The 1830 Treaty "provide[s] for the [Nations'] sovereignty within Indian country." *Id.* at 466.[14]

Montana v. United States, 450 U.S. 544, 565-66 (1981); *Williams v. Lee*, 358 U.S. 217, 219-21 (1959).

[14] The Nations' 1830 Treaty rights were reaffirmed in the 1855 Treaty of Washington ("1855 Treaty"), arts. 1, 7 June 22, 1855,

The *amici* Nations exercise their inherent and retained sovereignty under constitutions approved by the Secretary of the Interior that describe each Nation's geographic element by reference to treaty-defined boundaries. Chickasaw Const. arts. XII, XIII, *available at* https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US; Choctaw Const. arts. XII, XIII, *available at* https://www.choctawnation.com/sites/default/files/import/Constitution_1983.pdf. For example, the Chickasaw Nation governs within the boundaries described in the 1855 and 1866 Treaties. Chickasaw Const. prmbl. Legislative authority is vested in a Tribal Legislature, elected from districts defined with reference to the Reservation's boundaries, *id.* art. VI, §§ 1, 3. Adjudicatory authority is held by the Judicial Department. *Id.* arts. XII, XIII. The Tribal District Court has territorial jurisdiction over "all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Chickasaw Nation has authority." Chickasaw Code tit. 5, § 5-201.3, *available at* https://code.chickasaw.net/Title-05.aspx. And the Chickasaw Supreme Court has appellate jurisdiction "coextensive with the Chickasaw Nation." Chickasaw Const. amend. V, § 4. Likewise, the Choctaw Nation exercises its treaty right of self-

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11 Stat. 611. By that treaty, a Chickasaw district was established within the Reservation, although the Nations' common ownership of the Reservation remained in force. *Id.* arts. 2, 3. The Nations later entered into the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), in which they "cede[d] to the United States the territory west of the 98[th meridian]," *id.* art. 3, modifying only the Reservation's western boundary, while reaffirming their rights of self-government, *id.* art. 7, and their rights under prior treaties, *id.* arts. 10, 45.

government within the boundaries set forth in the 1855 Treaty. Choctaw Const. art. I, § 2. Legislative authority is vested in a Tribal Council elected from districts defined by reference to the Reservation boundaries, *id.* art. VIII, §§ 1, 2, and judicial authority is vested in the Judicial Department, *id.* arts. XII, XIII. The Choctaw Nation's courts have "general civil and criminal jurisdiction over all tribal Indian Country as described in Article I, Section 2" of the Choctaw Constitution. *See* Choctaw Nation, Res. CB-65-2009, § 1.101 (Apr. 11, 2009), *available at* https://www.choctawnation.com/sites/default/files/Court%20of%20General%20Jurisdiction%20Establishment.pdf.

Like the Creek Nation, the *amici* Nations provide governmental services within their Reservation that benefit Indians and non-Indians. Each maintains a police department that protects public safety.[15] Each provides healthcare services to the public through tribally-run hospitals, clinics, and health centers.[16] The Nations also provide numerous educational ser-

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[15] *See Lighthorse Police*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx (last accessed Sept. 25, 2018).

[16] *Health Facilities*, Choctaw Nation, https://www.choctawnation.com/tribal-services/health-services/health-facilities (last accessed Sept. 10, 2018); *Chickasaw Nation Medical Center*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx (last accessed Sept. 25, 2018).

vices, including childcare and early childhood programs,[17] family support services,[18] summer programs, Adult Education, High School Equivalency certification,[19] vocational rehabilitation programs,[20] a Choctaw language school,[21] and a residential learning center for Native American students.[22] They also provide

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[17] *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx (last accessed Sept. 25, 2018); *Early Childhood*, Choctaw Nation, https://www.choctawnation.com/tribal-services/education/early-childhood (last accessed Sept. 25, 2018).

[18] *Chokka Chaffa' (One Family)*, Chickasaw Nation, https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx (last accessed Sept. 25, 2018).

[19] *Adult Learning Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Adult-Learning-Program.aspx (last accessed Sept. 25, 2018).

[20] *Vocational Rehabilitation*, Chickasaw Nation, https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx (last accessed Sept. 25, 2018).

[21] *School of Choctaw Language*, Choctaw Nation, https://www.choctawnation.com/school-choctaw-language (last accessed Sept. 25, 2018).

[22] *Jones Academy*, Choctaw Nation, https://www.choctawnation.com/jones-academy-0 (last accessed Sept. 25, 2018).

services for substance abuse recovery, family preservation, and family violence prevention,[23] domestic violence shelters, and a group home for Native American children.[24]

Amici Nations also exercise sovereign authority under federal statutes. For example, the Chickasaw Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a).[25] *See* Chickasaw Code tit. 17, § 17-201.7, *available at* https://code.chickasaw.net/Title-17.aspx. And both Nations receive grants from the federal government to exercise their sovereign authority. For instance, they receive Indian Child Welfare Act grants to operate Indian child and family service programs on or near their Indian country. 25 U.S.C. §§ 1903(10), 1931(a). And the federal Department of Justice recently announced that it will award the amici Nations and the Creek Nation millions of dollars in Coordinated Tribal Assistance Solicitation grants to the Nations' law enforcement, to fund programs to expand community policing, prevent and prosecute

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[23] *Children & Family Services*, Choctaw Nation, https://www.choctawnation.com/tribal-services/member-services/children-family-services (last accessed Sept. 25, 2018); *Family Preservation*, Choctaw Nation, https://www.choctawnation.com/family-preservation (last accessed Sept. 25, 2018).

[24] *Chickasaw Children's Village*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Children-s-Village.aspx (last accessed Sept. 25, 2018).

[25] Indian tribes are "jurisdictions" under the Act, *see id.* § 20911(10)(H), if, like the Chickasaw Nation, they elect to maintain a sex offender registry, *id.* § 20929(a)(1)(A).

violence against native women, combat alcohol and substance abuse, and enhance tribal justice systems.[26]

The *amici* Nations' operation of these programs and services ultimately benefits all of eastern Oklahoma. The Nations undertake these governmental operations pursuant to their longstanding and comprehensive conception of tribal sovereignty, which, as expressed in their modern constitutions, is based on boundaries established by treaty. As we discuss next, these and other functions of tribal sovereignty are exercised within the context of cooperative relationships with the State, built on mutual recognitions of state and tribal sovereignty.

B. The *Amici* Nations, the Creek Nation, and the State Have Consistently Resolved Issues of Concern Within the Reservations by Inter-Governmental Agreement.

The State has consistently recognized the Creek and *amici* Nations' sovereignty in clear terms. State policy is to "recognize[] the unique status of Indian tribes within the federal government and ... work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments." Okla. Stat. tit. 74, § 1221(B). The Oklahoma Governor

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[26] Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Will Award Up to $246 Million in Grants to Improve Public Safety in American Indian and Alaska Native Communities (Sept. 19, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-will-award-246-million-grants-improve-public-safety-american-indian-and; Dep't of Justice, *Department of Justice Coordinated Tribal Assistance Solicitation FY 18 Combined Award List* 15-17 (2018), *available at* https://www.justice.gov/tribal/page/file/1095161/download.

and Oklahoma political subdivisions may "negotiate and enter into cooperative agreements" with Indian tribes in the state "to address issues of mutual interest." *Id.* § 1221(C)(1), (D)(1). And several Oklahoma agencies rely on a state-produced map that describes the Reservation boundaries of the Creek and *amici* Nations—among others—as the bounds of their jurisdiction.[27]

State law also recognizes the Creek and *amici* Nations' authority to adjudicate disputes within their Reservation. Oklahoma Supreme Court Rule 30(B), Okla. Stat. tit. 12, ch. 2, App., R. 30(B), provides that

> [t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith and credit under this rule than would a similar or comparable judgment of a sister state.

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[27] *See* Planning & Research Div., Okla. Dep't of Transp., *Tribal Jurisdictions in Oklahoma* (2010), *available at* http://www.okladot.state.ok.us/maps/tribal/2010_Tribal_Jurisdiction_Map.pdf; *Office of Tribal Liaison*, Okla. State Dep't of Health, https://www.ok.gov/health/Organization/Partnerships_for_Health_Improvement/Office_of_Tribal_Liaison/ (last accessed Aug. 22, 2018) (under "Overview" section, follow "Tribal Jurisdiction Map" hyperlink).

See Barrett v. Barrett, 878 P.2d 1051, 1054 (Okla. 1994). Under the Rule, the State has extended full faith and credit to judgments of all of the Five Tribes.[28]

Negotiations between the State and Indian tribes—including the *amici* Nations and the Creek Nation—based on these principles have been successful in a number of areas. The State and the *amici* Nations, for example, negotiated Tobacco Tax Compacts that recognize that under federal law Indian tribes have inherent sovereign rights to pass their own laws and be governed by them.[29] Under these Compacts, the Nation agrees to purchase cigarettes and other tobacco products only from a list of state-licensed wholesalers provided by the State, *e.g.*, Chickasaw-Okla. Tobacco Tax Compact, art. II §§ 2-3, and in lieu of a state tax being levied on tobacco products sold by the Nations on land owned by the Nation or its citizens, the State agrees to share with the Nation a "Compact Payment" equal to the state tax on that product, *id.* §§ 7-8. Thus, the Nations are not freezing the State out of this commerce. *Cf.* EFO Br. at 13.

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[28] *See Full Faith and Credit of Tribal Courts*, Okla. State Cts. Network, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214 (June 25, 2018).

[29] Chickasaw-Okla. Tobacco Tax Compact, art. 1 (Oct. 30, 2013), *available at* https://www.sos.ok.gov/documents/filelog/89572.pdf; Choctaw-Okla. Tobacco Tax Compact (Oct. 31, 2013), *available at* https://www.sos.ok.gov/documents/filelog/89578.pdf. The State first negotiated tobacco compacts with the Five Tribes in the mid-1990s. The State and tribes have successfully re-negotiated their compacts several times since then, including several re-negotiations during *amicus* Brad Henry's administration. *See* Editorial, *New Oklahoma Tobacco Compacts a Step in the Right Direction*, Oklahoman (Aug. 27, 2014), *available at* https://newsok.com/article/5336005/new-oklahoma-tobacco-compacts-a-step-in-the-right-direction.

So too in motor fuel. After this Court held that Oklahoma could not tax the Nations' motor fuel sales in Indian country, *Chickasaw Nation*, 515 U.S. at 455-56, the State enacted a law to "limit[] litigation" by "allow[ing] both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country" under "mutually beneficial agreements." Okla. Stat. tit. 68, § 500.63(A)(4).[30] Tribes that enter such agreements agree to include state taxes in their motor fuel sales in "Indian country," including sales to members, *id.* § 500.63(C)(1), and in exchange receive a portion of those taxes, *id.* § 500.63(C)(2)-(3), which must be used for certain governmental purposes, *id.* § 500.63(C)(5). The *amici* Nations and the Creek Nation have all entered into such agreements.[31]

Gaming is also conducted by tribal-state agreement. Since 1994, the *amici* Nations have engaged in Indian Gaming Regulatory Act ("IGRA") Class III Gaming on Indian lands on the Reservation under Gaming Compacts with the State, *see* 25 U.S.C. § 2710(d)(1)(C), and their tribal codes. They, and the Creek Nation, currently do so under the State's model compact,

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[30] The need for this legislation arose from the potential loss of millions of dollars of motor fuel taxes—which Mr. McCaleb addressed while serving as Transportation Secretary. *See Transportation Head Disputes Tribe's Figures*, Oklahoman (Feb. 10, 1996), *available at* https://newsok.com/article/2530731/transportation-head-disputes-tribes-figures.

[31] Chickasaw Nation-Okla. Motor Fuels Contract (Sept. 26, 1996), *available at* https://www.sos.ok.gov/documents/filelog/50348.pdf; Choctaw Nation-Okla. Motor Fuels Contract (Sept. 30, 1996). The Creek Nation accepted the State's terms by tribal resolution. Muscogee (Creek) Nation, Resolution No. TR 97-19 (Sept. 27, 1997), *available at* https://www.sos.ok.gov/documents/filelog/51327.pdf.

see S.B. 1252, 49th Leg., 2d Reg. Sess. § 22, (Okla. 2004), *available at* https://www.sos.ok.gov/documents/questions/712.pdf ("Model Compact"),[32] which acknowledges that each Tribal Nation is a "federally recognized tribal government possessing sovereign powers and rights of self-government" and that Indian gaming revenues support tribal governmental programs and related economic development in Oklahoma that "extend[s] beyond the tribe's lands ... ."[33]

Motor vehicle registration and license tags for the *amici* Nations' citizens are also governed by Compacts that recognize the *amici* Nations' "inherent sovereign powers of self-government, as secured by and under

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[32] The Nations' past and present gaming compacts are available at *Indian Gaming Compacts*, Office of Indian Gaming, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/gaming-compacts (last accessed Aug. 23, 2018) (select "Oklahoma" under "US State" and then select "Apply"). *Amici* Danny Hilliard, Dan Boren, and Kris Steele all voted on the bill establishing the Model Compact, and *amicus* Mr. Steele participated in the floor debate. Marie Price, *House OKs Gaming Bill*, Tulsa World (Feb. 27, 2004), *available at* https://www.tulsaworld.com/archives/house-oks-gaming-bill/article_8fcb4ce1-ba86-5aeb-bfa9-292a236f929b.html; Amber Esada, *Gaming Bill Passes Through House Floor*, Legislative Update: 49th Oklahoma Legislature Second Session–2004 (Okla. State Regents for Higher Educ., Okla. City, Okla.), Feb. 27, 2004, at 1, *available at* https://www.okhighered.org/leg-info/2004/Update-02-27-04.pdf. *Amicus* Brad Henry signed the bill and was Governor when it was approved in a public referendum. Rhett Morgan, *Tenth Anniversary of Oklahoma's Tribal Gaming Compact Celebrated*, Catoosa World (Nov. 18, 2014), *available at* https://www.tulsaworld.com/communities/catoosa/news/tenth-anniversary-of-oklahoma-s-tribal-gaming-compact-celebrated/article_56e17719-f7c9-5e83-89a5-0b4668f37bbf.html.

[33] Model Compact, pt. 2(1), (5)-(6).

federal law."[34] Under these Compacts the *amici* Nations design Tribe-specific license tags for their members that the State reviews and approves, *e.g.*, Choctaw-Okla. Motor Vehicle Compact, art. II, § 2, and then makes available to eligible *amici* Nation members, *id.* § 5. And the State remits to each amici-Nation 85% of the "basic fees, taxes ... penalties, and fines" that would otherwise go to the State's General Revenue Fund if it produced the tags. *Id.* § 9. The *amici* Nations and the Creek Nation have also negotiated highway improvement agreements with the Oklahoma Department of Transportation[35] that address among other things, signage for the Rising Water Ancient Mountains Scenic Byway,[36] funding for an interchange on Interstate 35 in Chickasaw

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[34] *See* Choctaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Aug. 29, 2014), *available at* https://www.sos.ok.gov/documents/filelog/90157.pdf; Chickasaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Oct. 23, 2014), *available at* https://www.sos.ok.gov/documents/filelog/90185.pdf.

[35] Prior to 2012, the State and tribes entered into these agreements under Okla. Stat. tit. 74, § 1221. However, H.R. 2564, 53d Leg., 2d Reg. Sess. (Okla. 2012), which was supported by *amici* Kris Steele, T.W. Shannon, Danny Hilliard, and Lisa Johnson Billy, *see House Votes*, Okla. House of Reps., https://www.okhouse.gov/ 53LEG/okh01465.txt (last accessed Sept. 25, 2018), streamlined the agreement process by exempting some transportation agreements signed after 2012 from § 1221, meaning that they no longer needed to be approved by the legislature's Joint Committee on State-Tribal Relations to become effective. *See* Okla. Stat. tit. 74, § 1221(C)(1), (D)(5).

[36] Chickasaw Nation-Okla. Scenic Byways Project Agreement (Aug. 19, 2011), *available at* https://www.sos.ok.gov/documents/filelog/87956.pdf.

territory,[37] cost sharing for resurfacing highways in Choctaw territory,[38] and the construction and funding of transportation-related tourism attractions in the Creek Reservation.[39]

As these agreements show, the Creek and *amici* Nations are not interested in ousting the State from tax collection, or in unsettling business and consumer expectations arising from State tax rates. *Cf.* EFO Br. at 9-10. Instead, cooperative sovereignty, manifested through a rich fabric of inter-governmental agreements, generates tax revenues that allow the Nations and the State to provide high-quality governmental services throughout the Reservation, which furthers the interests of the Creek Nation, the *amici* Nations, and the State. *Cf.* Int'l Mun. Lawyers Ass'n Br. at 12-18; OIPA Br. at 27. Similarly, the *amici* Nations' overriding interest is in preserving a healthy and productive economic climate for the oil and gas industry in eastern Oklahoma, not in disrupting oil and gas production, *see* OIPA Br. at 29.[40]

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[37] Memo. of Agreement Between Chickasaw Nation & Okla. (Aug. 18, 2011), *available at* https://www.sos.ok.gov/documents/filelog/87955.pdf.

[38] Agreement Between Choctaw Nation of Okla. & Okla. (Aug. 19, 2008), *available at* https://www.sos.ok.gov/documents/filelog/87967.pdf; Intergovernmental Project & Funding Agreement By & Between Okla. Dep't of Transp., & Choctaw Nation of Okla. (Sep. 24, 1998), *available at* https://www.sos.ok.gov/documents/filelog/87964.pdf.

[39] Muscogee (Creek) Nation-Okla. King Coal Depot Tourist Information Ctr. & Transp. Museum Agreement (Oct. 18, 2007), *available at* https://www.sos.ok.gov/documents/filelog/87962.pdf.

[40] Moreover, notwithstanding each *amici* Nation's long-standing and federally approved constitution's affirming geographic self-concepts that are co-extensive with treaty-defined reservation boundaries, neither of the *amici* Nations has enacted

The *amici* Nations' cooperation with State and local governments also enhances policing on the Reservation. Under state law, tribal police who have been commissioned by the Bureau of Indian Affairs ("BIA") and certified by the Council on Law Enforcement Education and Training ("CLEET") "shall have state police powers to enforce state laws" on fee land owned by an Indian tribe, or in Indian country. Okla. Stat. tit. 21, § 99a(D).[41] The *amici* Nations and Creek Nation have negotiated dozens of cross-deputization agreements with municipalities on their Reservations.[42] Under these agreements, tribal law enforcement officers commissioned by the BIA can enforce

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laws or otherwise sought to regulate or tax oil and gas production. Nor has the Creek Nation done so. *See Tribal Codes*, Choctaw Nation, https://www.choctawnation.com/government/judicial-branch/tribal-codes (last accessed Aug. 21, 2018) (providing links to Choctaw laws); Chickasaw Code tit. 15, ch. 5, *available at* https://code.chickasaw.net/Title-15.aspx ("Oil and Gas" chapter reserved with no provisions); Muscogee Code tit. 43, *available at* http://www.creeksupremecourt.com/wp-content/uploads/title43.pdf ("Oil and Gas" title reserved with no provisions).

[41] *Amicus* Lisa Johnson Billy authored the bill that amended § 99a to include this provision for tribal officers, *see* H.R. 1871, 54th Leg., 1st Reg. Sess. (Okla. 2013), and *amicus* T.W. Shannon voted for it, *House Votes*, Okla. House of Reps., https://www.okhouse.gov/54Leg/okh00783.txt (last accessed Sept. 24, 2018). *Amicus* Kris Steele earlier co-authored a bill, S.B. 1208, 49th Leg., 2d Reg. Sess. (Okla. 2004), signed by *amicus* Brad Henry, making it easier for cross-deputized tribal police to obtain CLEET certification. *See Week in Review*, Okla. Sen., http://www.oksenate.gov/news/week_in_review/week_in_review_2004/wir2004030104.html (last accessed Sept. 25, 2018); Travis Snell, *New Oklahoma Law Makes CLEET Certification Easier for Marshals*, Cherokee Phoenix (July 9, 2004), *available at* https://www.cherokeephoenix.org/Article/index/549.

[42] *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last accessed Sept.

federal law in Indian country, and if also commissioned by a municipality, can enforce state and local law within that jurisdiction. This *reduces*—not creates—jurisdictional confusion, and enhances public safety.

The State and the *amici* Nations also recently settled a dispute over water rights on the Reservation. *See* State of Okla., Choctaw, Chickasaw, City of Okla. City Water Settlement (Aug. 2016), *available at* https://www.waterunityok.com/media/1075/agreement-160808.pdf ("Settlement"). The Settlement addresses water appropriation and use in the "Settlement Area," defined as bounded by the South Canadian River, the Oklahoma-Texas state line, the Oklahoma-Arkansas state line, and the 98th meridian—that is, the Nations' Reservation. *See* Settlement § 1.58 (defining Settlement Area); 1866 Treaty, art. I (defining patent boundaries); *see also* Settlement § 2.1.1.5 (referencing treaties as source of Nations' claims). Congress approved the Settlement, *see* Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. No. 114-322, § 3608, 130 Stat. 1627, 1796-1814, and that Act expressly recognizes the boundaries of the

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25, 2018) (type "deputization" in "Doc Type" bar and select "Submit"); Tony Choate, *Lighthorse, Narcotics Bureau Ink Cross-Deputization*, Chickasaw Times, June 2007, at 1, 27 (reporting comments of *amici* T.W. Shannon and Lisa Johnson Billy on a Chickasaw-Oklahoma cross-deputization agreement), *available at* http://c919297.r97.cf2.rackcdn.com/i2yujhdnhkyt9oiy4gx5py4kkhqhvq-optimized-pub.pdf; D.E. Smoot, *County and Creek Law Enforcers Approve Agreement*, Muskogee Phoenix (June 11, 2017), *available at* http://www.muskogeephoenix.com/news/county-and-creek-law-enforcers-approve-agreement/article_4d5539fe-69ca-586b-9411-a1a34266a7be.html.

Settlement Area, *id.* § 3608(b)(18), 130 Stat. at 1798-99.

Under the Settlement, the State issues permits and administers water rights in the Settlement Area, Settlement § 5.1, on terms that "enhance water availability for use within the Settlement Area, to support recreation, fish and wildlife needs," *see id.* §§ 5-6, and the Nations secured their rights to existing uses of water and to appropriate water in the future, *id.* § 7. Rather than maximizing their water demand, *see* EFO Br. at 13, the Nations' approach benefits all water users. Indeed, the Settlement expressly affirms as a shared policy objective, "a common interest in in the long-term sustainability of Settlement Area Waters," which *amici* Nations and the State pledge to pursue through coordinated resource planning and study efforts for their mutual benefit throughout the Settlement Area. Settlement § 9.1.2. The Settlement further seeks to implement cooperation on shared sovereign interests. It does so through the establishment of two institutions. First, it creates a Settlement Commission, responsible for evaluating and providing the threshold report on any proposed out-of-state use of Settlement Area Waters. *Id.* §§ 5.3.3.2, 5.3.3.3. Second, it establishes a Water Preservation Infrastructure Fund, which is to be comprised of any revenues that may be derived from an approved out-of-state use of Settlement Area Waters and which may only be expended for purposes of jointly valued projects, i.e., water and wastewater infrastructure throughout the State, *id.* § 5.3.3.5.1, with an express prioritization for projects "located within or serving the Settlement Area," *id.* § 5.3.3.5.2.4.

Among the various fears stoked by certain Petitioner-supporting *amici*, we point particularly to

OIPA's fear that the Creek Nation could seek to preempt state regulation of water quality on the Reservation under the "treatment as a state" ("TAS") provisions of the Clean Water Act, 42 U.S.C. § 7601(d), or the Safe Drinking Water Act, *id.* §§ 300j-11(a), (b)(1), 300h-1(e). *See* OIPA Br. at 27-28. OIPA's argument essentially ignores the fact that federal law already vests Oklahoma with authority to veto any such regulation. Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Pub. L. No. 109-59, 119 Stat. 1144, 1937, provides that when the EPA approves Oklahoma state environmental regulatory plans under federal environmental laws, it must also, if Oklahoma requests, approve "the State to administer the State program in the areas of the State that are in Indian country without any further demonstration of authority by the State." *Id.* § 10211(a). Furthermore, EPA may grant a Tribe TAS only if the State and Tribe have entered a cooperative agreement, approved by EPA, to jointly administer the program. *Id.* § 10211(b)(2).

In sum, the Nations' sovereignty has furthered, not hindered, the interests of the State, local governments, and non-Indians in eastern Oklahoma by strengthening Oklahoma's economy and improving quality of life for Indians and non-Indians alike. Petitioner's *amici*'s fear-ridden mischaracterization of that relationship should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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